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Cases Cited.

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In the Supreme Court of the United States

OCTOBER TERM, 1940.

SCHRIBER-SCHROTH COMPANY, *Petitioner,* vs. THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, *Respondents.*	No. 9.
ABERDEEN MOTOR SUPPLY COMPANY, *Petitioner,* vs. THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, *Respondents.*	No. 10.
F. E. ROWE SALES COMPANY, *Petitioner,* vs. THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, *Respondents.*	No. 11.

RESPONDENTS' REPLY TO THE REJOINDER OF THE PETITIONERS ON THE MOTIONS TO REMAND AND THE PETITION FOR REHEARING.

It seems to us that this case has developed into a "stern chase," petitioners presenting proposition after proposition as the error of each preceding proposition is shown, as follows:

(1) It was contended that our expert had said that the webs of the Long piston were flexible, but the record

shows that what he said was that they were not flexible *enough* (this was the famous argument in re the unwinding of the double negative), while the Long patent described only rigid webs.

(2) It was contended that Jardine could not construe his webs as flexible in the light of his specification. This Court decided this point against the petitioners.

(3) It was then contended that terms in the claims in suit had been in claims made and cancelled in the file wrapper; in its decision this Court agreed with the petitioners to the extent of reading features into the cancelled claims. It has now been shown that this is not, and cannot be, correct (see the affidavits of Watts and Robertson). Petitioners have not supported the Court's views, but have sought other grounds upon which a decision adverse to the respondents might have been predicated, as follows:

(4) It was contended that this Court should take the Long and Spillman pistons and reconstruct them in order to cure the error in the Court's decision and to make out a new set of facts to which the decision could be applied; the same would have to be done with Hartog.

(5) The error of this fourth proposition having been shown, it is now contended that there is non-infringement.*

Petitioners are just as wrong on the question of infringement as upon the other questions presented.

The record shows that the only difference between the Jardine piston and the accused piston, Exhibit 1, is a matter of degree of operation. Experts for both parties testified to this fact, so that the "entirely different manner" in which the pistons are said by the petitioners to

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* And which this Court cannot consider without overruling *General Pictures v. General Electric*, 304 U. S. 175, at pp. 177, 178; *Connecticut Ry. v. Palmer*, 305 U. S. 493, at p. 496; *Crown Cork v. Gutman*, 304 U. S. 159, at p. 161; and numerous cases earlier and later.

operate is merely a matter of degree. On this subject the petitioners' expert testified as follows (R. p. 258):

> "XQ. Now, you have said something about the relation between the flexing of the web at the top in Exhibit 1 and in the Jardine patent, and you said that there would be more flexing in the Jardine patent than in Exhibit 1. That would be *a difference in amount or degree*, wouldn't it?
>
> "A. Yes."

and (R. p. 263):

> "RDQ. Mr. Richey asked you on cross examination whether the flexibility of Exhibit 1 and the Jardine patent structure was one of degree, and I believe you answered yes. What did you have in mind when you made that answer, that the flexibility was the same?
>
> "A. *No, it was comparable in degree.*
>
> "RDQ. And how in degree?
>
> "A. *One might be more flexible than another in degree.*"

To the same effect is our expert's testimony. (R. pp. 39, 324-326.)

The operation illustrated in Fig. F in our last brief (i.e., the one with the green cover) and the description of the same there are fully expounded in and supported by the record. (R. pp. 37-40.) That infringement cannot be escaped by a mere change in degree is too well established and known to need citation of authority here.

It must be borne in mind that the amounts of flexing are minute. On this subject the record is as follows (R. p. 326):

> "The amount of flexibility found by micrometer measurement just now is considerable from the standpoint of piston clearance, which is measured in thousandths of an inch and some times in ten-thousandths of an inch."

This is one of the replies to the question and answer quoted at page 2 of the petitioners' rejoinder brief. The other

reply to this question and answer and to the contentions made in connection therewith is that they deal with a hypothetical structure. The answer shows that even when considering the hypothetical structure, flexibility would still be present and, notwithstanding every effort to stiffen the webs, the only result would be to increase the difficulty of securing successful operation. In other words, a patent suit ought hardly to be determined upon how difficult of operation someone, hostile to the patent, could by modifications make the structure. The practical question is how successfully the device can be constructed, and the general theory is that those who approach the proposition will do so with intelligence.

(6) We also doubt the wisdom of allowing to stand as the law of the land a decision predicated upon reasons which are so clearly shown to be erroneous that even petitioners seek to flee to other ills rather than suffer this one. We have pointed out the erroneous reasoning. The lack of confidence by the petitioners in the opinion is manifested by their effort to have the case decided upon other propositions, with the contention that it does not matter upon which proposition the decision rests, so long as the conclusion is the same. In other words, the petitioners recognize, as we do, that the statements in the affidavits of Watts and Robertson are correct and, being correct, this Court's decision cannot be correct.

(7) **Patentability of the Allowed Claims Over the Rejected Claims:** This question is presented for the first time in petitioners' rejoinder brief. It is proposed as another "life line" for the petitioners if the non-infringement argument fails. It is not raised by the Petition for Certiorari. The petitioners' contention is predicated upon misconstruction of the opinions of both the Circuit Court of Appeals and of this Court. It is corrupt in its premises, since mechanical novelty cannot be negatived merely by finding old words removed from their context.

Conclusion: We have no doubt that this brief will be followed by another brief from the petitioners presenting another and different proposition which is equally erroneous with each of the seven propositions which have already been presented by the petitioners. We ask to be excused from pointing out the errors in any propositions presented hereafter.

Respectfully submitted,

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